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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No. 470

JOHN CLAY, *Petitioner,*

vs.

SUN INSURANCE OFFICE, LIMITED, *Respondent.*

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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JOHN CLAY, *Petitioner*,

vs.

SUN INSURANCE OFFICE, LIMITED, *Respondent*.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

John Clay, by his undersigned counsel, petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on [redacted] JUNE 19, 1963

OPINION OF THE COURT BELOW.

The opinion of the United States Court of Appeals for the Fifth Circuit record (Supp. R. 19-32) dated June 19, 1963, is printed in Appendix "C".

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on June 19, 1963 (Supp. R. 34). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED FOR REVIEW.

Should a federal court sitting in Florida recognize a "suit clause" contained in a personal property insurance policy issued in Illinois but under which loss occurred in Florida, the insured at the time of the loss being a resident of the State of Florida? All of the property for which the claim was made having been located in the State of Florida, and the insurer being admitted to do business in Florida?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The constitutional provision upon which the Court below based its opinion is the due process clause of the Fourteenth Amendment to the Constitution of the United States which provides as follows:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *."

The statutes involved in this case are Section 95.03, Florida Statutes 1957, and Ill. Rev. Stat. 1957, Chapter 73, Section 837, which are printed in Appendix "A" and Appendix "B" of this petition.

STATEMENT OF THE CASE.

A complaint was filed by the petitioner John Clay against the respondent Sun Insurance Office, Limited, on May 20, 1957, in the United States District Court for the southern district of Florida, Miami division, seeking to recover $13,500.00 claimed in damages for loss of personal property under a personal property floater policy issued to the petitioner by the respondent on April 22, 1952 (R. 2, 3, 4). Attached to the complaint is a copy of the insurance policy (R. 8-13). The jurisdiction of the District Court was invoked because of the diversity of citizenship of the parties to the suit and the fact that the amount in controversy exceeded, exclusive of interest and cost, the sum of $3,000. Service was had upon the respondent and answer to the complaint was filed June 12, 1957 (R. 4-7). In the answer, by way of affirmative defense, the respondent raised the question of the suit clause contained in the policy (R. 5). The suit was tried before a jury in West Palm Beach, Florida, on June 4, 1958, and a verdict was entered in favor of the petitioner in the sum of $6,000 (R. 14), and final judgment was filed June 4, 1958, in accordance with the verdict of the jury (R. 14). On June 12, 1958, the respondent filed a "Motion for Judgment non obstante veredicto or in the alternative for a new trial" (R. 15-16). Paragraph 7 of the motion dealt with the question presented in this petition (R. 16). The matter was heard by the United States District Court on July 15, 1958, and an order denying the motion and setting a supersedeas bond was entered on the same date (R. 17). Notice of appeal was then filed on August 8, 1958 (R. 17). Thereafter, briefs were filed by the appellant and the appellee in the lower court and the matter was argued before the United States Court of Appeals sitting in Jacksonville, Florida, on March

11, 1959. On April 8, 1959, the United States Court of Appeals for the Fifth Circuit rendered its opinion reversing the judgment of the District Court and remanding the case for entry of judgment in favor of the appellant (R. 113-125). Judgment was entered by the United States Court of Appeals on April 8, 1959 (R. 126). On April 23, 1959, an extension of twenty days was granted for the filing of a motion for rehearing on the part of the plaintiff, John Clay, and the State of Florida as *amicus curiae*. On May 12, 1959, a petition for rehearing was filed by Clay, the plaintiff (R. 131, 133), and by the Attorney General of the State of Florida as *amicus curiae* (R. 134, 137). No opinion was rendered on the order denying rehearing but the Minutes of the Court reveal that the order was denied on May 28, 1959, with Circuit Judge Rives dissenting (R. 149). In the original opinion of the United States Court of Appeals (R. 113-125) and in the order denying rehearing one of the Judges dissented from the majority opinion and considered it advisable to state his personal views.

Following the denial of a rehearing, on the 26th day of August, 1959, petition for writ of certiorari was filed with the Clerk of the Supreme Court of the United States and given the docket No. 349, October Term, 1959. On October 26, 1959, the Honorable Court granted the petition for writ of certiorari and transferred the case to the summary calendar (R. 42). Following the granting of the petition for writ of certiorari, the Attorney General of the State of Florida requested permission to file briefs as *amicus curiae* on behalf of the State of Florida. The petition of the Attorney General was granted. Various briefs were filed on behalf of the petitioner and the Honorable Court heard oral argument by the attorneys for the petitioner, the respondent, and the Attorney General of the State of Florida as *amicus curiae* on the 22nd day of March, 1960. Subse-

quent to the oral argument the Court reversed and remanded the decision of the United States Court of Appeals (*Clay* v. *Sun Insurance Office, Limited*, 363 U.S. 207, 80 S. Ct. 1222, 4 L. Ed. 2d 1170) with instructions to the Court of Appeals that it certify two questions concerning the case to the Supreme Court of Florida, and in pursuance to the mandate of the Supreme Court the Circuit Court propounded to the Florida Supreme Court the following questions (Supp. R. 11-22):

"(1) Are the provisions of Sections 95.03 and 95.11(3), Florida Statutes, making void any provisions of an insurance contract requiring suit on the contract to be filed in a period shorter than five years applicable to a personal property, world-wide, all-risks, floater insurance policy under the following circumstances: the policy was applied for in Illinois from a British company, qualified to do business in Illinois and in Florida and nine other states, by the assured, who was then a resident of Illinois; the premium was paid in Illinois and the policy was issued there in 1952; subsequently, the assured moved his legal residence to Florida and the losses occurred there in 1954-55; suit was filed in Florida more than twelve months after discovery of the loss; the policy provided that any suit under the contract must be filed within twelve months from the discovery of the loss; the twelve-month limitation clause of the contract is valid and enforceable in the State of Illinois?"

"(2) Does an all-risks policy of insurance containing the following provision, 'The Company will also pay the actual loss of or damage (except by fire) to property of the Assured not specifically excluded by this Policy caused by theft or attempt thereat; or by vandalism or malicious mischief to the interior of the residences of the Assured,' and containing numerous limitations, exceptions and exclusions but none touching on acts of a spouse of an assured, cover losses from acts of vandalism and from theft committed by

the wife of the assured, hostile to him and without his consent, when the property damaged and taken was in the common residence of the assured and his wife?"

The Florida Supreme Court amended its Appellate Rules by adopting a rule relating to "Certified Questions From Federal Courts" (*Sun Insurance Office, Limited,* v. *Clay,* Fla., 133 So.2d 735).

Thereafter, the Florida Supreme Court handed down its Opinion on October 18, 1961 (Supp. R. 4-17) and answered the propounded questions in the affirmative.

Thereafter, the United States Court of Appeals for the Fifth Circuit advised the attorneys for appellant and appellee that it would receive briefs if counsel desired to file briefs. Briefs were filed by the attorney for appellant and attorney for appellee. On October 2, 1962 (Supp. R. 18), the case was argued before the United States Court of Appeals for the Fifth Circuit in Jacksonville, Florida. On June 19, 1963, the United States Court of Appeals for the Fifth Circuit rendered its opinion (Supp. R. 19-31), again reversing the judgment of the District Court and remanding the case for entry of judgment in favor of the appellant (Supp. R. 33).

REASONS RELIED UPON FOR THE ALLOWANCE OF WRIT OF CERTIORARI.

This is the second time that this suit has been before the Supreme Court of the United States on petition for writ of certiorari. In the first instance, the Supreme Court granted the certiorari (R. 42) and reversed the Court of Appeals for the Fifth Circuit and remanded the case with instructions that the Court should propound two questions to the Florida Supreme Court, since the Court

felt that the disposition by the Florida Supreme Court of one or both of the questions might avoid the Constitutional question (*Clay* v. *Sun Insurance Office, Limited*, 363 U.S. 207, 80 S. Ct. 1222, 4 L. Ed. 2d 1170).

In arriving at the conclusion that the answer to the first question, *supra*, which is in fact the only question involved in this petition for writ of certiorari, the Florida Supreme Court concluded that the contact with the contract and the parties by the State of Florida was sufficient to give a Florida court jurisdiction of a suit thereon. Subsequent to the decision by the Florida Supreme Court, *supra*, the District Court of Appeals of Florida, Second District, in reversing a Circuit Court Summary Final Decree, made a similar finding in the suit of *Frederick Schluter, Sr., Appellant*, v. *National Union Fire Insurance Company of Pittsburgh, Pennsylvania*, Fla. 144 So.2d 95.

The United States Court of Appeals for the Fifth Circuit chose to utterly disregard the findings of the Florida Supreme Court and the Court of Appeals, Second District, and affirmed its opinion of April 8, 1959 (see Appendix "E"), by an opinion dated June 19, 1963 (see Appendix "C").

Along with many of its sister states (Carnahan, Conflict of Laws and Life Insurance Contracts, 1958, 137, page 657; 7 Couch on Insurance, 1629, page 5704), the State of Florida has by statute undertaken to forestall the insertion in insurance policies of stipulations for the bringing of suit within a limited time. Florida's statute declares stipulations in contracts to be "illegal and void" and provides that "No court in this state shall give effect to any provision or stipulation of the character mentioned in this section." (95.03 Fla. Stat. 1957. See Appendix "A"). The Illinois statute deals only with life insurance con-

tracts (Ill. Rev. Stat. 1957, Ch. 73, 837. See Appendix "B").

The appellant, Sun Insurance Office, Limited, which does business in both Illinois and Florida, in an attempt to derive the greatest possible advantage from the more lax laws of Illinois, placed in the insurance contract in question the following clause:

> "Suit Clause:—No suit, action or proceeding for the recovery of any claim under this Policy shall be sustained in any court of law or equity unless the same be commenced within twelve (12) months next after the discovery by the Assured of the occurrence which gives rise to the claim. Provided, however, that if by the laws of the state within which this Policy is issued such limitation is invalid, then any such claims shall be void unless such action, suit or proceeding be commenced within the shortest limit of time permitted by the laws of such state to be fixed herein."

The general rule is stated in 29 Am. Jur. (Insurance, 1394), page 1041, as follows:

> "* * * Where the statutes of the forum make void all agreements whereby the time for the bringing of actions is fixed at a period less than that prescribed by law, a contractual stipulation made in another jurisdiction is not available as a defense."

This proposition is supported by the decisions in *Galliher* v. *State Mutual Life Insurance Co.*, 150 Ala. 543, 43 So. 833 (1907); *Asel* v. *Order of United Commercial Travelers*, 197 S.W.2d 639 (Mo. 1946); *Gulf Insurance Co.* v. *Holland Construction Co.*, 236 S.W.2d 1003 (Ark. 1951); contra: *Union Central Life Insurance Co.* v. *Barnes*, 175 Ky. 364, 194 S.W. 339 (1917) (no statute involved).

The Court, in its opinion of June 19, 1963, as it had in its opinion of April 8, 1959, held that a violation of the

due process would result if Par. 95.03, Florida Statutes, 1957, were applied to the insurance contract in question. In reaching this conclusion the Court relied upon *Home Insurance Company* v. *Dick*, 281 U.S. 397 (1929); *Holderness* v. *Hamilton Fire Insurance Company of New York*, 54 F. Supp. 145 (S.D. Fla. 1944); *Hartford Accident and Indemnity Company* v. *Delta Pine Land Company*, 292 U.S. 143 (1933); and *Confederation Life Association* v. *Ugalde*, Fla., 151 So.2d 315, 318. None of these cases takes the arbitrary position that the place of contracting necessarily and in all circumstances controls the validity of stipulations as to the time within which suit must be brought. In each of these cases the Court takes the position that on the particular facts of that case, sufficient connections were lacking between the state of the forum and the contract to justify the forum imposing its public policy considerations upon the contract. Each of these cases is clearly distinguished from the case at bar.

In the case of *Home Insurance Company* v. *Dick*, *supra*, the forum had substantially no connection with the contract whatsoever. The contract was made in another jurisdiction, the loss occurred in another jurisdiction, and the risk under the insurance policy was never within the jurisdiction of the forum. Similarly, in the *Holderness* case, *supra*, the forum was merely the place in which the suit happened to have been instituted. In that case the insurance policy was entered into in North Carolina, the property insured had its situs in North Carolina, and the loss occurred in North Carolina. In that case, Florida was merely the forum and nothing more.

In the case at bar, however, throughout substantially all of the contract period, the property insured was in the State of Florida, the loss to the property occurred in Florida, and consequently the cause of action arose in that

state. Florida was therefore the "natural" or "normal" forum. In addition, the insured was a bona fide resident of Florida at the time the cause of action arose, and at that time the insurer was admitted to do business in Florida. The only connection with the State of Illinois with the contract was that the contract was issued in Illinois. If it can be asserted that there are any circumstances in which a state, other than the state in which the contract was made, has sufficient interest in the contract to impose its statutes to nullify the contract stipulation on the basis of its public policy, then the case at bar presents such a situation.

The facts in the *Delta Pine Land Company* case, *supra*, are more similar to the facts of the case at bar. In that case the cause of action apparently arose in the State of Mississippi where the suit was brought and where there is a statute similar to Section 95.03, Florida Statutes, 1957, in existence. Certain other factors in that case, however, are not identical with the case at bar. In the *Delta Pine Land Company* case, the risk was not a risk of property loss in which there was a situs of the property. The risk was one involving the honesty of employees, which employees were located in several states. In the case at bar the property insured had a situs in Florida and the risk was all concentrated in that state. However, the primary difference between the *Delta Pine Land Company* case and the case at bar is that the former did not involve a contract stipulation involving the time within which suit must be brought. That case involved a stipulation requiring that a claim must be presented to the insurer within fifteen months after the termination of the suretyship (see Appendix "D").

Thus the holding in the *Delta Pine Land Company* case cannot be considered to be a holding in point, as a con-

tract stipulation regarding the time within which suit must be brought was not at issue in this case. The language of that case, however, is most important. The Court said that the question is basically one of "the relative importance of the interest of the forum as contrasted with those created at the place of the contract, * * *." (292 U.S. 150).

In addition to the factors in the case at bar that the property insured was located in Florida throughout most of the policy period, that the insured was a citizen of Florida throughout most of the policy period, that the insurer was admitted to do business in the State of Florida during all of the policy period, and that the loss occurred in Florida, several other factors pertaining to this particular type of contract are relevant. A contract of insurance is not an ordinary bilateral contract. There is no "meeting of the minds" between both parties on all of the policy provisions. A contract of insurance is a contract prepared in its entirety by the insurer and it is accepted by the insured. He has no control whatsoever over any of the terms of the policy. The only protection an insured has against unfair, unreasonable or improper provisions in the contract of insurance is the fact that, in most states, regulation is imposed on the insurer in regard to policy forms. Such form contracts are subject to the public policy of the forum (Cf. *The Kensington*, 183 U.S. 263 (1901)).

In its opinion of June 19, 1963, the United States Court of Appeals relied not only on the Dick case and the Delta Pine case, but in addition relied upon the findings of the Florida Supreme Court in the Ugalde case. The Ugalde case is certainly not a criteria for the case at bar. It is hard to imagine a state having less contact with the contract or the parties than the State of Florida had in the Ugalde case.

A final consideration is that an agreement to fix a period of limitations by contract is a matter which relates to the administration of justice and is not entitled to the same protection accorded to ordinary contract provisions (Cf. *Carbon Black Export* v. *The SS Monrosa*, 354 F.2d 297 (5th Cir. 1958), cert. denied 359 U.S.

If the interests of the forum are sufficient, neither the due process clause nor the full faith and credit clause of the Federal Constitution require the forum to apply the normal conflict of laws rules (Cf. *Alaska Packers Association* v. *Industrial Accident Commission*, 294 U.S. 532 (1934); *Young* v. *Masci*, 289 U.S. 253 (1930)). In the case at bar, the interests of the State of Florida are superior to the interests of any other state because Florida was the place of performance of the contract, it was the place in which the cause of action arose, it was the state of the policyholder's domicile, the insurance company was subject to regulation of its business in Florida, and, finally, because contracts of insurance are a type of commercial endeavor in which regulation in the public interest is essential.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

/s/ Paschal C. Reese

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CERTIFICATE OF SERVICE.

The undersigned Attorney for Appellee, hereby certifies that true and foregoing Petition for Writ of Certiorari has been served upon BERT COTTON, Esq., REIN, MOUND & COTTON, 116 John Street, New York 38, New York, Attorney for Appellant, by United States air mail, postage prepaid, this 14th day of Sept, 1963.

/s/ Paschal C. Reese

PASCHAL C. REESE

APPENDIX

APPENDIX "A".

Section 95.03, Florida Statutes, 1957. "Stipulations in contract shortening period of limitation illegal.—All provisions and stipulations contained in any contract whatever entered into after May 26, 1913, fixing the period of time in which suits may be instituted under any such contract, or upon any matter growing out of the provisions of any such contract, at a period of time less than that provided by the statute of limitations of this state, are hereby declared to be contrary to the public policy of this state, and to be illegal and void. No court in this state shall give effect to any provision or stipulation of the character mentioned in this section.

History—Secs. 1, 2, Ch. 6465, 1913; R.G.S. 2391; C.G.L. 4651."

APPENDIX "B".

Ill. Rev. Stat. 1957, Ch. 73, Section 837. "(1) After the effective date of this code no policy of life insurance shall be issued or delivered in this state if it contain any of the following provisions:

(a) A provision limiting the time within which any action at law or in equity may be commenced to less than three years after the cause of action shall accrue."

APPENDIX "C".

Opinion of the United States Court of Appeals for the Fifth Circuit rendered June 19, 1963.

IN THE

United States Court of Appeals

FOF THE FIFTH CIRCUIT

No. 17,525

SUN INSURANCE OFFICE, LIMITED,
Appellant,

VERSUS

JOHN CLAY,
Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(June 19, 1963)

Before JONES and BELL, Circuit Judges, and ESTES, District Judge.

JONES, Circuit Judge: By this opinion this Court writes another chapter, perhaps not the final one, in this litigation which commenced more than six years ago and has commanded the attention of four courts.

The appellee, John Clay, procured a personal property floater policy of insurance from the appellant, Sun Insurance Office, Limited. The policy was issued in 1952 in Illinois, where Clay was then living. Clay moved to Florida. The policy contained a suit clause which provided that no action could be maintained unless commenced within twelve months after the discovery of the loss, with a proviso that if the limitation was invalid under the law of the state in which the policy was issued,

then suit must be brought within the shortest time permitted by the law of that state. The suit clause was valid in Illinois. A Florida statute declared such provision contrary to the public policy of the state and to be illegal and void, and directed that no court in the state should give effect to any such contract provision. In the winter of 1954-1955 property of Clay, covered by the policy, was deliberately destroyed by Clay's wife. The loss was reported to Sun on February 1, 1955, and it denied liability on April 1, 1955.

On May 20, 1957, Clay brought an action on the policy against Sun in the District Court for the Southern District of Florida, basing jurisdiction on diversity of citizenship. Sun asserted two defenses, that the action was not brought within the time limited by the suit clause, and that the policy did not cover losses willfully caused by the spouse of the insured. The district court entered judgment for Clay on a jury verdict for $6,800. On appeal, this Court declined "to make the difficult guess as to what the Florida state courts might decide if they were presented with" the issue as to whether the Florida statute applies to a contract such as was before it. This Court held that constitutional due process requirements precluded Florida from applying its statute to the contract made in Illinois. *Sun Insurance Office, Limited* v. *Clay*, 5th Cir. 1959, 265 F. 2d 522. Reliance was placed by this Court, in reaching its decision, upon *Home Insurance Co.* v. *Dick*, 281 U. S. 397, 50 S. Ct. 338, 74 L. Ed. 926, 74 A.L.R. 701, and *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U. S. 143, 54 S. Ct. 634, 78 L. Ed. 1178, 92 A.L.R. 928.

The Supreme Court reversed this Court's decision. *Clay* v. *Sun Insurance Office, Limited*, 363 U. S. 207, 80 S. Ct. 1222, 4 L. Ed. 2d 1170. The Supreme Court concluded that the Dick and Delta & Pine cases were not con-

clusive on the constitutional issue. Therefore, said the Court, a decision should have been first made as to whether, under Florida law, the Florida statute is applicable and whether the losses resulting from the wife's conduct were within the policy coverage, since the disposition of one or both of these questions might avoid the constitutional question. The Supreme Court, in closing its opinion, commented upon the observation of this Court as to the difficulties of making "a confident guess" as to how the Florida Supreme Court would construe the Florida statute. Following that comment and in concluding its opinion, the Supreme Court said:

> "The Florida Legislature, with rate foresight, has dealt with the problem of authoritatively determining unresolved state law involved in federal litigation by a statute which permits a federal court to certify such a doubtful question of state law to the Supreme Court of Florida for its decision. Fla. Stat. Ann. 1957, § 25.031. Even without such a facilitating statute we have frequently deemed it appropriate where a federal constitutional question might be mooted thereby, to secure an authoritative state court's determination of an unresolved question of its local law. See Allegheny County v. Mashuda Co., 360 U.S. 185, 189, and cases cited; see also Meredith v. Winter Haven, 320 U.S. 228, 336." 363 U. S. 207, 212.

On August 12, 1960, this Court, "pursuant to the opinion and mandate[1] of the Supreme Court," certified the two

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1. It is ordered and adjudged by this Court that the judgment of the said United States Court of Appeals, in this cause be, and the same is hereby, remanded to the United States Court of Appeals for the Fifth Circuit for proceedings in conformity with the opinion of this Court.

questions[2] to the Supreme Court of Florida. On March 1, 1961, the Supreme Court of Florida adopted a rule relating to Certified Questions from Federal Courts. In Re Florida Appellate Rules, 127 So. 2d 444. On October 18, 1961, the Supreme Court of Florida rendered an opinion. *Sun Insurance Office, Limited* v. *Clay*, Fla., 133 So. 2d 735.

We have a doubt as to the effect to be given to the recital in the Supreme Court's Clay-Sun Insurance Office opinion that the Florida Legislature "has dealt with the problem of authoritatively determining unresolved state law involved in federal litigation." The citation to *Allegheny County* v. *Mashuda Co.*, 360 U. S. 185, 189, 79 S. Ct. 1060, 3 L. Ed. 2d 1163, would permit an inference that a use of the Florida certification statute was an invocation of abstention or the equivalent of it. But abstention, as we understand the doctrine, is a remitting of the parties in a pending federal court action to a state court for a decision of a question of state law with a determination of the other issues by the federal court; or, upon the election of the party remitted to the state court, for a complete

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2. (1) Are the provisions of Sections 95.03 and 95.11(3), Florida Statutes, making void any provisions of an insurance contract requiring suit on the contract to be filed in a period shorter than five years applicable to [the policy here in suit under the facts here presented]?

(2) Does an all-risks policy of insurance containing the following provision,

> "The Company will also pay the actual loss of or damage (except by fire) to property of the assured not specifically excluded by this Policy caused by theft or attempt thereat; or by vandalism or malicious mischief to the interior of the residences of the Assured;

. . . cover losses resulting from acts of vandalism and from theft committed by the wife of the assured, hostile to him and without his consent, when the property damaged and taken was in the common residence of the assured and his wife?

and final adjudication by that court of the entire controversy. *N.A.A.C.P. v. Button*, 371 U. S. 415, 427, 83 S. Ct. 328, 9 L. Ed. 2d 405.

We do not think the Supreme Court intended, by the recital to which we have referred, to treat the opinion of the Florida court as constituting a binding determination which became the law of the case and res judicata such as would, we believe, have been true if the parties had been remitted to the state court and it had made an adjudication in litigation inter parties during a federal court abstention. The Florida certification statute does not require nor, we think, does it contemplate that the parties in the federal litigation shall submit themselves to the jurisdiction of the state court. The rule of the Florida Supreme Court purports to require briefs and permits oral argument. The power of the federal court to make a determination of the litigable issues between the parties to the pending cause was neither transferred to nor shared with the state court. The Supreme Court of Florida has, it seems, original jurisdiction only in the issuance of extraordinary writs. Fla. Const. Art. V, Sec. 4(2); *City of Dunedin v. Bense*, Fla., 90 So. 2d 300.

We need not determine whether the opinion of the Florida Supreme Court, given in answer to the questions certified to it by this Court, is merely advisory and entitled, like dicta, to be given persuasive but not binding effect as a precedent,[3] or is to be credited under Erie-Tompkins[4] doctrine and the rule of stare decisis as though it were

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3. Lee v. Dowda, 155 Fla. 68, 19 So.2d 570; Myers v. Atlantic Coast Line Railroad Co., Fla., 112 So.2d 263; State v. Florida State Improvement Commission, Fla., 60 So.2d 747; Pell v. State, 97 Fla. 650, 112 So. 110.

4. Erie Railroad Company v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487.

the ratio decidendi of a decision made in adversary litigation before the court. A Florida District Court of Appeal has followed[5] the opinion of the Supreme Court of Florida. This Court being "in effect, only another court of the State"[6] in a diversity action, is required to follow the opinion in its statements as to Florida law. As to the law of the United States, and particularly with respect to constitutional issues, the Florida court's views are without binding effect.

After a recital of the rule that insurance contracts are to be liberally construed in favor of the insured, the Florida court stated that the husband was covered against the willful destruction of property by his wife. The parties, on oral argument, have conceded that this is a correct statement of the law of Florida. We accept it as such.

We find the Florida court's pronouncements on the other submitted question more troublesome. In rendering an answer to the question as to whether the Florida statute is applicable to the suit clause of the policy under the facts recited, the Florida court, at the outset, expressed agreement with the contention of the insurer that it would be absurd to impute to the Florida Legislature any intention of asserting an interest in a contract executed in another state by residents of other states involving property in another state. Thus, it seems to have been recog-

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5. Schluter v. National Union Fire Insurance Co., Fla., 144 So.2d 95.

6. Guaranty Trust Co. v. York, 326 U.S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079, 160 A.L.R. 1231; King v. United Commercial Travelers, 333 U.S. 153, 68 S. Ct. 488, 92 L. Ed. 608, reh. den. 333 U.S. 878, 68 S. Ct. 900, 92 L. Ed. 1153, Cf. Comment, Robertson, Inter-Sovereign Certification as an Answer to the Abstention Problem, 21 La. L.R. 777; Nieto, The Abstention Doctrine, 40 Denver L.C.J. 45.

nized that there might be circumstances under which Florida courts would give effect to a suit clause in an insurance contract. But, said the Florida court, it is clear "that the legislature intended the act to apply to 'any contract whatever'—foreign or domestic—when Florida's contract therewith, existing at the time of its execution or occurring thereafter, is sufficient to give a court of this state jurisdiction of a suit thereon." 133 So. 2d 735, 738. The Florida court concluded that Florida's contact with the contract and the parties was sufficient to give a Florida court jurisdiction of a suit thereon. "Accordingly", said the Florida court, "the first question certified to this court, supra, must be answered in the affirmative."

If, as the Florida court says, the application of the statute to invalidate the suit clause depends upon whether the Florida court would have jurisdiction of a suit on the policy, then of course the affirmative answer was required. It is a general principle that an action on an insurance policy seeking a money judgment is a transitory action which may be brought wherever service of process can be had on the defendant. *Confederation of Canada Life Insurance Company* v. *Vega Y Arminan*, Fla., 135 So. 2d 867, cert. den. 144 So. 2d 805. If, as the Florida court has intimated, the ability to serve the insurance company with process is the Florida test for determining whether the law of the forum will be applied in ascertaining the enforceability of policy clauses which are valid where the contract is made, a novel doctrine has been announced. We do not think it was intended by the Florida court to make the application of the statute in a given case dependent upon jurisdiction of the court over the parties and the subject matter in an action on the policy. It is difficult to see how the statute could be applied and an effective judgment rendered if there were no jurisdiction of the parties

and subject matter.[7] Rather than attribute to the Florida court a literal meaning to the language it used, we think it intended to do no more than to declare that if the State of Florida had such significant contacts with the factual phases of the litigation as to give it a paramount interest in the control of the governing legal rules, then its invalidating statute would be applied. If the surmise which we have made, and we must make one, as to the meaning of the Florida court's statement of Florida law is a correct one, then it must be apparent that the court was persuaded of the existence of the required significant contacts in this case.

It seems improbable that a question would be certified to the Florida Supreme Court unless, at the time the question was certified, the federal court intended to accept the answer as "authoritatively determining" the law of the state. But if the statement of a rule of Florida law so made is based upon an erroneous concept of a principle of constitutional law, then we think we are required to examine its opinion in the light of constitutional doctrines as they are understood by us.

The Florida Supreme Court, in its Clay opinion, stated that it was not "concerned, of course with the constitutionality vel non of [the Florida statute] as applied to so called foreign contracts, including the subject contract," since the question was not before it. The reason given by the Florida court for the answer returned is that significant contacts of Florida with the policy of insurance and the cause of action upon it had been shown and therefore the statute would be applied to invalidate the policy provision.

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7. But see Schluter v. National Union Fire Insurance Co., supra, where jurisdiction was said to be the test of the applicability of the statute.

In other words, it seems to us that the Florida court has said that because of the contacts, which it found to be significant, there is no due process requirement of permitting a defense under the suit clause of the insurance contract.

We are unable to separate the significant contact test from the constitutional due process question. The question of due process is a federal question. Whatever else might be said about an opinion of the Florida Supreme Court in response to a certified question from this Court, it seems certain that its conclusion as to a Federal constitutional question or its premise from which it reaches such conclusion are not binding upon us as the law of the case, res judicata, stare decisis, or otherwise. We are of the view that we can and must decide whether there are here the significant contacts upon which the application of the Florida statute depends. This we think we must do uncontrolled by the Florida court's opinion and uninfluenced by what it has said except as we are persuaded by such logic as is to be found in its reasoning and the weight of any precedents which may support it.

Prior to this case there had been two decisions where the effect of the Florida statute had been considered. One of these, by the Supreme Court of Florida, held that the delivery of an insurance certificate in Florida made the contract subject to Florida law, including the statute making void contract clauses reducing the statutory limitation for bringing suits. *Sovereign Camp, Woodmen of the World,* v. *Mixon,* 79 Fla. 420, 84 So. 171. The inference can be urged that had the certificate been issued in a state where there was no invalidating statute, the suit clause could have been successfully interposed as a defense. The other case was decided by the United States District Court for the Southern District of Florida. *Holderness* v. *Hamil-*

ton Fire Ins. Co., 54 F. Supp. 145. It was there held that the Florida statute could not be asserted to bar a suit clause defense in an action on a fire policy issued in North Carolina upon a building in North Carolina where the clause was valid. The law of Florida, as declared in these two cases, has been thus stated:

> "Stipulations in an insurance policy shortening the period within which suits must be instituted under it to a period less than that provided by the statute of limitations are illegal and void under the statutes of this state. This rule applies to contracts made outside the state, if delivery of the policy is made in the state by a local agent so as to make the contract subject to Florida law. But there is an important qualification. If the stipulation limiting the period during which action may be brought under a policy is valid by the law of the state where the contract was executed and is to be performed, that stipulation will be recognized in Florida as a defense, though the court will not affirmatively enforce performance in such cases." 18 Fla. Jur. 300, Insurance § 406.

Subsequent to the opinion of the Florida Supreme Court in the Clay matter and to the opinion of the Florida District Court of Appeal in the Schluter case, another Florida Court of Appeal decision was rendered. It did not involve the particular Florida statute which is here before us, but consideration was given to the Florida law with respect to contractually created defenses to actions which are or may be invalid under the law of the forum. The "significant contacts" rule was recognized and applied. The Court said:

> "When a suit is brought on a contract in a jurisdiction other than the one which governs the rights and obligations thereunder, a defense lawfully vested under the law of the latter jurisdiction may not be

> ignored by the forum if that state had no significant connection with the contract obligations. Rejection of such rights under the contract, asserted as a defense, is a deprivation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States and Section 12 of the Declaration of Rights of Florida." Confederation Life Association v. Ugalde, Fla., 151 So. 2d 315, 318.

The court, in the Ugalde case, gave approval to the Holderness decision and to the former opinion of this Court in *Sun Insurance Office* v. *Clay*. The court also cited with approval the Dick case and the Delta and Pine case upon which this Court relied in its former opinion in this case.

The presence or absence of the significant contacts is, we think, the determinant of constitutional due process. *Watson* v. *Employers Liability Corporation*, 348 U. S. 66, 75 S. Ct. 166, 99 L. Ed. 74. In its former opinion, as has been earlier noted, this Court was guided by the principles stated in the Dick case and in the Delta and Pine case, supra. Our further consideration of the constitutional issue has left us convinced that the reasoning of the former opinion of this Court is sound. It is our view that the decision previously made was correct and that we should adhere to it. The doctrine of the Dick and Delta and Pine cases which was set forth in this Court's former opinion and there regarded as controlling is still believed by us to be the governing principle upon which the case should be decided. We cannot find that the rule of these precedents has been overruled or modified. The Supreme Court has referred to them in terms of approval. *United Commercial Travelers* v. *Wolfe*, 331 U. S. 586, 67 S. Ct. 1355, 91 L. Ed. 1687, 173 A.L.R. 1107. It is urged that *Watson* v. *Employers Liability Assurance Corporation*, 348 U. S. 66, 75 S. Ct. 166, 99 L. Ed. 74, requires a different conclusion. We are not so persuaded.

The Watson opinion, commenting on the Delta & Pine case, noted that the activities of Mississippi, the state of the forum, in connection with the policy were so slight and so casual that Mississippi could not apply its own law in such a way as to enlarge the obligations of a contract validly created under the law of another state. In the Delta and Pine case a Connecticut insurance company had entered into a fidelity bond in Tennessee insuring a Tennessee corporation against loss resulting from dishonesty of employees. A condition of the contract required all claims to be filed within fifteen months from the termination of the contract. A Mississippi statute provided that statutes of limitation could not be altered by private agreement. An employee of the insured corporation defaulted. No claim was made within the fifteen-month period. The Mississippi court held the contract provision invalid and allowed recovery. The Supreme Court, by a unanimous decision, reversed. The local contacts of Florida, in the case before us, are certainly no more, and in our view are less, than in the Delta and Pine case. We are, we believe, required to follow it.

In the Ugalde case, supra, the policy was issued by a Canadian insurance company in Cuba to a Cuban resident who came to the State of Florida and there demanded payment of the cash surrender value of the policy in United States dollars in accordance with the terms of the policy. It was held that there were no such significant Florida contacts as prevented the Florida courts from applying a Cuban law which required payment in Cuban currency. This Court has held that the law of Illinois controlled in an action on a life insurance policy issued in Illinois on which a diversity suit was brought in Florida after the removal to and death of the insured in Florida. *Mutual Life Insurance Co. of New York* v. *Hess*, 5th Cir. 1947, 161

F. 2d 1; *In re Mutual Life Insurance Co. of New York*, 5th Cir. 1951, 188 F. 2d 424. In the earlier decision of this Court in this cause it was held that the State of Florida did not have sufficient contacts to deprive the insurer of its defense under the suit clause, 265 F. 2d 522, 526. This holding is probably not the law of the case in view of the Supreme Court's remand. It is, however, in our opinion, a sound conclusion which should be restated and reaffirmed. We therefore decide, as was before decided, that the district court erred in failing to sustain the appellant's defense to the action. The judgment of the district court will be reversed and the cause remanded for the entry of a judgment for the appellant.

REVERSED AND REMANDED.

A true copy

(Seal)

Test: EDWARD W. WADSWORTH
Clerk U. S. Court of Appeals, Fifth Circuit
/s/ G. F. Ganucheau
Deputy

New Orleans, Louisiana, August 12, 1963.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1962

No. 17,525

D. C. Docket No. 7608-M-Civil

SUN INSURANCE OFFICE, LIMITED,
Appellant,

VERSUS

JOHN CLAY,
Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before Jones and Bell, Circuit Judges, and Estes, District Judge.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the said District Court for the entry of a judgment for the appellant;

It is further ordered and adjudged that the appellee, John Clay, be condemned to pay the costs of this cause in

this Court for which execution may be issued out of the said District Court.

June 19, 1963

Issued as Mandate:

Recoverable Costs:

Docketing Cause, Etc. . $25.00

APPENDIX "D"

Contract stipulation from *Hartford Accident and Indemnity Company* v. *Delta Pine Land Company*, 150 So. 206:

"Any claim hereunder must be duly made upon the surety within fifteen (15) months after the termination of the suretyship for the defaulting employee, and no suit, action, or proceeding shall be brought hereunder by the employer against the surety after the expiration of twelve (12) months after the filing of proof of loss as above required, or, in case such limitation be void under the law of the place governing construction hereof then within the shortest period of limitation permitted by such law."

APPENDIX "E".

Opinion of the United States Court of Appeals for the Fifth Circuit, dated April 8, 1963.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17,525

SUN INSURANCE OFFICE LIMITED,
Appellant,

VERSUS

JOHN CLAY
Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(April 8, 1959.)

Before RIVES and TUTTLE, Circuit Judges and SIMPSON, District Judge.

TUTTLE, Circuit Judge: This is a suit on a personal property floater policy. It was instituted in the United States District Court for the Southern District of Florida by the insured, John Clay. A jury awarded recovery in the total amount of $6,800.00 and judgment was entered accordingly. The insurer appeals, contending the district court erred in holding that the stipulation in the policy which forbade suit unless it was instituted within twelve months next after discovery of the loss[1] was rendered

1. "Suit Clause:—No suit; action or proceeding for the recovery of any claim under this Policy shall be sustainable in any court of law or equity unless the same be commenced within twelve (12) months next after discovery by the Assured of the occurrence which gives rise to the claim. Provided, however,

void and unenforceable by Florida Revised Statute 95.03 (1957), which reads as follows:

> "Stipulations in contract shortening period of limitation illegal.—All provisions and stipulations contained in any contract whatever entered into after May 26, 1913 fixing the period of time in which suits may be instituted under any such contract, or upon any matter growing out of the provisions of any such contract at a period of time less than that provided by the statute of limitations of this state, are hereby declared to be contrary to the public policy of this state, and to be illegal and void. No court in this state shall give effect to any provision or stipulation of the character mentioned in this section."

We agree with appellant's contention as to this defense, and therefore we do not reach its other contentions.

The policy was issued and delivered to appellee on April 22, 1952, in Chicago, Illinois. At that time appellee was a citizen of and resided in the state of Illinois. He paid the premium in a lump sum in Chicago when he received the policy. Subsequently, in July 1952, appellee moved to Florida. He purchased a ranch near Lake Harbor, Florida, in July or August 1952 and became a resident of Florida from that time on. In December, 1954 and January, 1955, while he was living at the ranch near Lake Harbor, certain of his insured personal property was destroyed by vandalism and other insured property was stolen. Appellee notified appellant of his losses on February 1, 1955. After investigating the claim, appellant denied liability on April 6, 1955. Suit was not instituted until May 20, 1957.

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that if by the laws of the state within which this Policy is issued such limitation is invalid, then any such claims shall be void unless such action, suit or proceeding be commenced within the shortest limit of time permitted by the laws of such state to be fixed herein."

Under the terms of the "Suit Clause" this suit was barred because of appellee's failure to institute it within twelve months next after he had discovered the losses. According to the law of Illinois, such a contractual provision was and is valid and enforceable.[2]

This insurance policy was issued and delivered in Illinois to a citizen of that state, and it was paid for by him while he was present and residing in that state. It insured the appellee's personal property which was at that time presumably in the same state. According to the law of Florida, it was therefore an Illinois contract, the validity and interpretation of which would ordinarily be determined by the law of Illinois. *Connor* v. *Elliott*, 79 Fla. 513, 85 So. 164, cert. dismissed, 254 U.S. 665. Since the law of Illinois validates clauses limiting the time within which suit may be brought, this clause presents a good defense to appellee's suit unless the Florida statute renders in unenforceable in any Florida court.

This presents a question which substantially affects the outcome of this suit, and since federal jurisdiction in this case is based on diversity of citizenship, we must apply the law which the state courts of the forum would apply (*Guaranty Trust Co.* v. *York*, 326 U.S. 99; *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487), insofar as the state law does not violate the constitution of the United States. See *Sampson* v. *Channell*, 1 Cir., 110 F.2d 754, cert. denied 310 U.S. 650.

The wording of the Florida statute is quite general and broad, and it appears to apply to all contracts, wherever

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2. *Trichelle* v. *Sherman & Ellis, Inc.*, 259 Ill. App. 346; *Hartzell* v. *Maryland Cas. Co.*, 163 Ill. App. 221; see also Smith-Hurd Ann. St., Ch. 73, §969a(1)(k) (1958); cf. Smith-Hurd Ann. St., Ch. 73, §§ 837(1)(a), 903(1)(a) (1958).

made or performed, which happen to be sued upon in the courts of Florida. However, there are no reported instances where this statute has been applied under circumstances similar to those presented here; and the jurisprudence of Florida gives us reason to believe that the Florida state courts would construe it as being inapplicable under these circumstances.

The following representative decisions demonstrate the Florida courts' tendency, based on their interpretation of the requirements of due process and their recognition of the general common law rules of comity, to refrain from attempting to apply Florida statutes or their own notions of public policy to foreign contracts which are valid where entered into: *Connor* v. *Elliott, supra*; *Sovereign Camp, Woodmen of the World* v. *Mixon*, 79 Fla. 420, 84 So. 171; *Equitable Life Assur. Soc. of U.S.A.* v. *McRee*, 75 Fla. 257, 78 So. 22; *American Fire Ins. Co.* v. *King Lumber & Mfg. Co.*, 74 Fla. 130, 77 So. 168, aff'd., 250 U.S. 2.

It is thus quite possible that the Florida state courts would reach the same conclusion that the Kentucky court reached in *Union Cent. Life Ins. Co.* v. *Barnes*, 175 Ky. 364, 194 S.W. 339[3]—that the validity of a contractual provision limiting the time within which suit can be brought is to be determined by the *lex locus contractu* rather than the *lex fori*. This result could be expected if the court did not fall into the Alabama Supreme Court's error[4] of assuming that the issue presented concerned the choice of the applicable statute of limitations rather than

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3. See also *Brooks* v. *Travelers' Protective Ass'n of America*, E.D. N.Y., 47 F.2d 618.

4. *Galliher* v. *State Mutual Life Ins. Co.*, 150 Ala. 543, 43 So. 833.

the choice of the substantive law governing the validity of the contract itself.[5]

We are not obliged, however, to make the difficult guess as to what the Florida state courts might decide if they were presented with this issue, for we conclude that there is only one possible decision which would be consonant with due process of law:[6] to deny application of the Florida statute to this contract.

Examining the decisions of the Supreme Court of the United States on this subject, we find none which involves the identical circumstances presented here, but we find several which present very similar facts and which, we feel, clearly and unmistakably point out the result which must be reached in this case.

The case of *Home Insurance Co. v. Dick, supra,* involved a contract of marine insurance issued and paid for in Mexico and insuring a vessel which was never inside the state of Texas, the state in which suit on the policy was brought. The original insurance was payable in Mexico. After this insurance was issued, the risk was reinsured (outside of Texas) by a New York insurer which was qualified to do business in Texas. The original assured assigned the policy to a citizen of Texas who was then in Mexico and remained there until after the occurrence of the loss; after which he returned to Texas and brought an *in rem* action in Texas by garnishment proceedings directed against the domestic insurance agents. The defendants pleaded a stipulation in the policy forbidding suit except within one year

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5. See *Union Central Life Ins. Co.* v. *Barnes,* 175 Ky. 364, 194 S.W. 339, 340; *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.,* 292 U.S. 143, 149; cf. *Home Insurance Co.* v. *Dick,* 281 U.S. 397, 406, 409, 410.

6. Cf. *Sampson* v. *Channell,* 1 Cir., 110 F.2d 754, cert. denied 310 U.S. 650.

next following the loss. The Texas courts denied the defendants the benefit of this stipulation. They held it was invalidated by a Texas statute outlawing such agreements. The Supreme Court of the United States reversed the Texas courts by a unanimous vote. In an opinion written by Mr. Justice Brandeis, the Court stated that the statute as construed by the Texas courts deprived the defendants of property without due process of law. This statute, the Court held, increased their obligation and imposed burdens they had not contracted for; and this, the Court held, could not be done even in the name of the public policy of Texas.

This holding was followed by Judge Strum, of the District Court for the Southern District of Florida, later a member of this Court, in the case of *Holderness* v. *Hamilton Fire Ins. Co. of New York*, S.D.Fla., 54 F. Supp. 145, which involved the Florida statute we are here considering. But, appellee argues, in the Holderness case the plaintiff was a resident of the state of North Carolina, the policy was issued in North Carolina, and the building which was insured was located in North Carolina ("Holderness was nothing more than a sojourner in the State of Florida"). Thus, he contends, the Holderness decision, like the Dick decision, was dictated by a situation which is not duplicated in this case: the forum's lack of sufficient connection with the disputed contracts to warrant the invocation of the public policy of the forum.

Assuming that a state might, if its connections with a foreign contract are sufficiently great, be permitted to effectuate its own public policy by striking down an agreement which was valid where made, the question remains: are the contacts which Florida has with this contract great enough to permit this to be done in this case? These contacts consist of nothing more than the presence of the insured property and the beneficiary in the state of

Florida beginning subsequent to the formation of the contract and continuing up to the time of the suit. Nothing was to be done in Florida pursuant to the insurance contract except the purely ministerial act of payment by the insurer, and that was so only because of the fortuitous circumstance of the assured's removal from Illinois to Florida. Under strikingly similar circumstances, the Supreme Court has held that the forum state did not have the right to deprive a defendant of a contractual provision limiting the time within which suit could be brought. *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 282 U.S. 143, reh. den., 292 U.S. 607.

In the Delta & Pine Land case, the contract concerned a fidelity bond by which the defendant, a Connecticut corporation, qualified to do business in Mississippi and Tennessee, had insured the plaintiff, a Mississippi corporation with its principal office in Tennessee, against loss resulting from dishonesty of its employees "in any position anywhere." The policy listed twenty-one employees who were then working in Mississippi.[7] The contract, however, was negotiated and executed in Tennessee. It contained a condition that any claim under the contract had to be made within fifteen months from the termination of the suretyship agreement. One of the employees whose acts were insured against committed defalcations in Mississippi and the insured sued the indemnitor in that state. A Mississippi statute stated that all contracts of insurance on property, lives or interests in Mississippi were deemed made in that state; another stated that the Mississippi statutory periods of limitations of actions could not be altered by private agreements. The Mississippi court, applying these statutes, struck down the aforementioned contractual condition and allowed recovery on the contract despite the plaintiff's

7. *Watson* v. *Employers Liability Co.*, 348 U.S. 66, 77.

failure to make claim within the fifteen-month period. The Supreme Court reversed in a unanimous decision.

The following language from the Supreme Court's opinion sets forth precisely the principles we must follow and the decision we must make in the present case:

> "It is urged, however, that in this case the interest insured was in Mississippi when the obligation to indemnify the appellee matured, and it was appellant's duty to make payment there; and these facts justify the state in enlarging the appellant's obligation beyond that stipulated in the bond to accord with local public policy. The liability was for the payment of money only, and was conditioned upon three events,—loss under the policy, notice to the appellant at its home office, and presentation of claim within fifteen months of the termination of the suretyship. All of these conditions were of substantial importance, all were lawful in Tennessee, and all go to the obligation of the contract. It is true the bond contemplated that the employee whose faithfulness was guaranteed might be in any state. He was in fact in Mississippi at the date of loss, as were both obligor and obligee. The contract being a Tennessee contract and lawful in that state, could Mississippi, without deprivation of due process, enlarge the appellant's obligations by reason of the state's alleged interest in the transaction? We think not. Conceding that ordinarily a state may prohibit performance within its borders even of a contract validly made elsewhere, if the performance would violate its laws (Home Insurance Co. v. Dick, supra, p. 408), it may not on grounds of policy ignore a right which has lawfully vested elsewhere if, as here, the interest of the forum has but slight connection with the substance of the contract obligations. Here performance at most involved only the casual payment of money in Mississippi. In such a case the question ought to be regarded as a domestic one to be settled by the law of the state where the contract was made.

> A legislative policy which attempts to draw to the state of the forum control over the obligations of contracts elsewhere validly consummated and to convert them for all purposes into contracts of the forum regardless of the relative importance of the interests of the forum as contrasted with those created at the place of the contract, conflicts with the guaranties of the Fourteenth Amendment. Aetna Life Ins. Co. v. Dunken, supra; Home Insurance Co. v. Dick, supra. Cases may occur in which enforcement of a contract as made outside a state may be so repugnant to its vital interests as to justify enforcement in a different manner. Compare Bond v. Hume, 243 U.S. 15, 22. But clearly this is not such a case." 292 U.S. at 149, 150.

In accordance with the foregoing, we hold that the provision in the subject insurance policy which limits the time in which suit can be brought is a substantial property right which is protected by the Fourteenth Amendment to the Constitution, and under the circumstances of this case a violation of due process would result from the application of Florida Statute 95.03 to this provision.

As the Supreme Court observed in the Delta & Pine Land case, our conclusion that it would violate due process renders unnecessary a consideration of whether it would violate the full faith and credit or the contract clauses of the federal constitution. Extensive research, however, among the decisions of the Supreme Court and the lower federal and state courts relating to control of interstate relations by the due process and full faith and credit clauses discloses that the Dick and Delta & Pine Land decisions have been cited many times and have never been called into question or limited by later decisions of the Supreme Court. See e.g., *Watson* v. *Employers Liability Corp.*, 348 U.S. 66, 71, 76-78; *Lauritzen* v. *Larsen*, 345 U.S. 571, 590, 591; *Order of Travelers* v. *Wolfe*, 331 U.S. 549, 608, 628; *Pink* v. *A.A.A. Highway Express*, 314 U.S. 201, 211; cf.

Hanson v. *Deckla*, 357 U.S. 235, 254; *Hoopeston Co.* v. *Cullen*, 318 U.S. 313.

The cited cases form part of a larger body of law which has as a basic premise the principle that only where a state has significant interests involved may it impair property rights created in other states. See, e. g., *Pink* v. *A.A.A. Highway Express*, 314 U.S. 201, 209-11. A secondary principle which is also of significance here is that even though the affected interests of the state may be substantial enough to justify its refusal to give affirmative help in enforcing a foreign contract which it finds obnoxious, these interests may, on the other hand, be insufficient to justify the state's rewriting the contract, enlarging the obligation of the makers and enforcing it in a manner contrary to their undertaking. *Watson* v. *Employers Liability Corp.*, 348 U.S. 66, 76 (concurring opinion); *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U.S. 143, 149, 150; *Home Insurance Co.* v. *Dick*, 281 U.S. 397, 408-10; see also *Holderness* v. *Hamilton Fire Ins. Co. of New York*, S.D. Fla., 54 F. Supp. 145.

Following the principles set out above, we hold that the district court erred in failing to sustain the appellant's defense to this suit.

The judgment of the district court is REVERSED and the case is REMANDED for entry of judgment in favor of the appellant.

RIVES, Circuit Judge, Dissenting:

The Legislature of the State of Florida has enacted that, "All provisions and stipulations contained in any contract whatever . . . fixing the period of time in which suits may be instituted under any such contract . . ., at a

period of time less than that provided by the statute of limitations of this state, are hereby declared to be contrary to the public policy of this state, and to be illegal and void. No court in this state shall give effect to any provision or stipulation of the character mentioned in this section." Florida Statutes Annotated, §95.03. The language of that statute seems to me to leave no room for construction; it applies to "any contract whatever."

No one has attacked the validity of that statute as applied to contracts made in Florida, or can reasonably do so. Stipulations shortening the period of limitation result in the same evils and abuses whether entered into in the State of Florida or outside that State. I cannot agree that the Florida Legislature, or the courts of that State, must accord to such a stipulation contained in an ambulatory contract of insurance held by a Florida resident, but entered into in Illinois, any greater sanctity than they would accord to such a stipulation made in Florida. I think that the Florida Legislature can protect residents of that State against the application in Florida courts of stipulations shortening the period of limitation in contracts performed in Florida regardless of the place where the contracts are executed. I therefore respectfully dissent.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, United States Court of Appeals, Fifth Circuit

By Clara R. James
Deputy

New Orleans, Louisiana
August 12, 1959
(Seal)

Judgment.

Extract from the Minutes of April 8, 1959.

No. 17,525.

SUN INSURANCE OFFICE LIMITED,

versus.

JOHN CLAY.

This cause came on to be heard on the transcript of the Record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for entry of judgment in favor of the appellant;

It is further ordered and adjudged that the appellee, John Clay, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Rives, Circuit Judge, dissenting."

Order Denying Petitions for Rehearing.

Extract from the Minutes of May 28, 1959.

No. 17,525.

SUN INSURANCE OFFICE LIMITED,

versus.

JOHN CLAY.

It is ordered by the Court that the petitions for rehearing filed in the above styled numbered cause be, and the same are hereby Denied. "Rives, Circuit Judge, dissenting.